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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 71-1082

REUBIN O'D ASKEW, et al.,
Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,
Appellees.

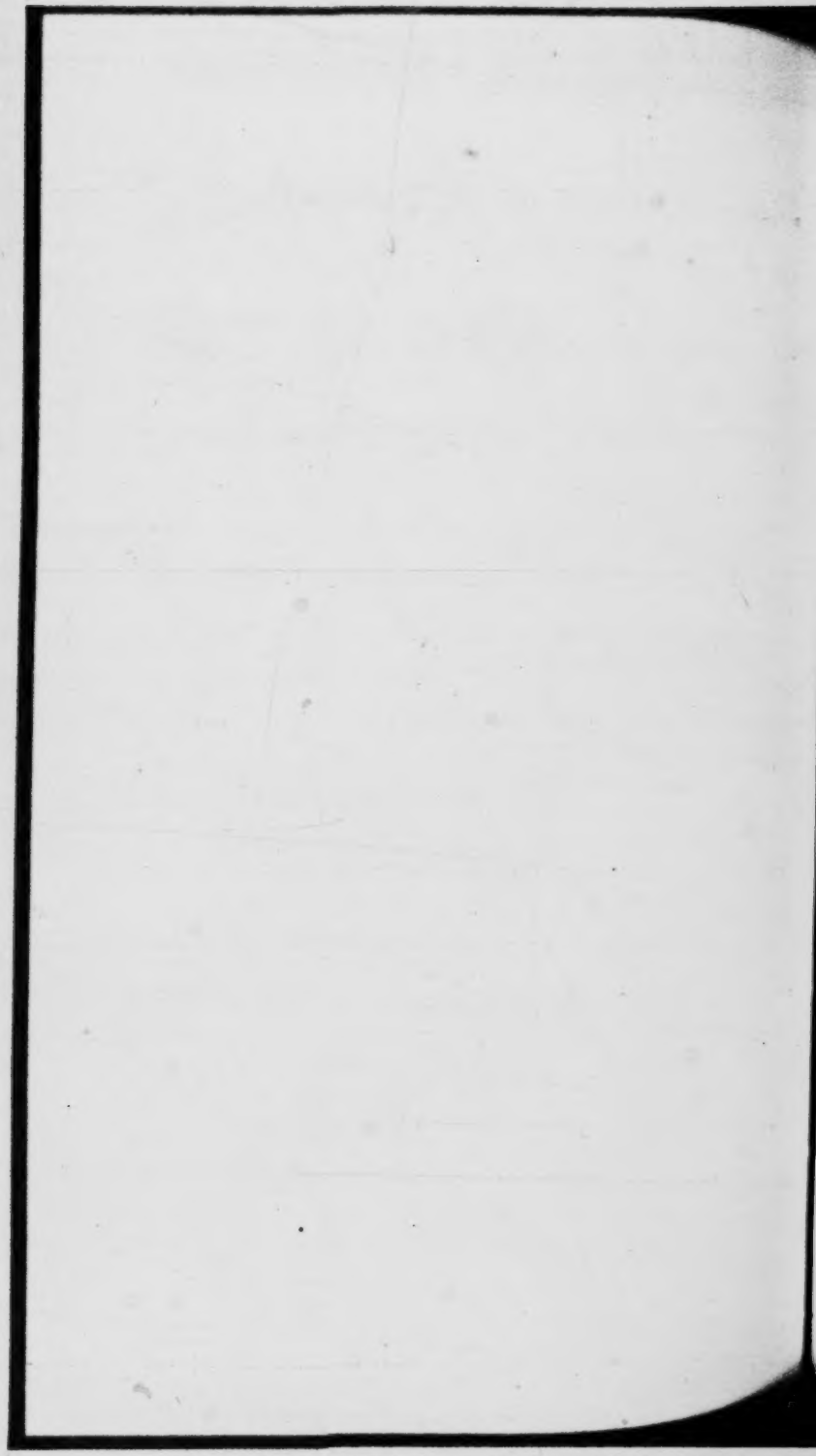
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State of New York,
Amicus Curiae
80 Centre Street
New York, New York 10013
(212) 488-7567

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG
JAMES P. CORCORAN
Assistant Attorneys General
of Counsel



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Interest of the *Amicus*

The State of New York has long been a leader in the enactment of legislation designed to protect the health, safety, and welfare of its citizens from the harmful effects of pollution. Section 1221(2) of the New York Public Health Law prohibits the discharge of oils and other specified pollutants into the territorial waters of New York, and in §§ 1250, 1251 and 1252, civil and criminal penalties are imposed for such a

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violation.* At present the State is considering passage of legislation which would impose absolute liability on those responsible for the discharge of oil into the territorial waters of the State. This proposed legislation has certain similarities with Chapter 70-244, Laws of Florida, 1970, the statute under consideration here.

Substantial damage has been done to the coastal waters of New York, in Long Island Sound and elsewhere, by the spillage of large quantities of oil from tankers and other sources. Future damage is likely to be even greater, especially if the federal government leases areas for oil drilling along the Atlantic seaboard on the Outer Continental Shelf. The devastating effects of such oil pollution have already been demonstrated in the Santa Barbara Channel and the Gulf of Mexico, and it is our position that the states, under the ample authority of their police powers, may prohibit oil pollution of the coastal waters within their territorial jurisdiction just as they prohibit the discharge of other hazardous and polluting substances into the state's air and waters.

Because of New York's vital concern with the preservation and protection of its waters, and in view of the State's interest in enacting legislation to impose strict liability on oil spills within New York's territorial waters, New York views the outcome of this litigation with deep interest. We are concerned with the effect that appellees' challenge to the Florida Act, if successful, might have on New York's efforts to protect its shoreline and coastal waters, and the environmental and economic interests represented therein, from one of the most harmful forms of pollution known to man—oil pollution. The decision in this litigation may therefore have a substantial effect on the health, safety, welfare, and legal rights of the citizens of New York State and our sister states.

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* The full text of Public Healtth Law § 1221 is set forth as an Appendix to this brief.

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The State of New York respectfully files this brief as *amicus curiae* in support of appellants' jurisdictional statement.

The Questions Presented Are Substantial

A.

The first substantial question is whether the admiralty and maritime jurisdiction of the federal government completely negates the right of the states to enact statutes to protect their territorial waters, and the natural resources therein, from irreparable damage caused by the discharge of oil into said waters. The federal Submerged Lands Act of 1953, 43 USC 1311, grants the states exclusive jurisdiction in the submerged lands from the shoreline to the three-mile limit. And traditionally the courts have recognized the right of states to legislate in protection of the fisheries upon which the coastal states so heavily depend. See, e.g., *Skiriotes* v. *Florida*, 313 U.S. 69 and *Manchester* v. *Massachusetts*, 139 U.S. 240. There can be no doubt that oil pollution of the states' coastal waters will have the most catastrophic effects on the fish and shellfish industries and therefore on the very health and welfare of our citizens, in addition to manifest detrimental impact on the economy of the states.

In the exercise of its police power, the states may act, in maritime and interstate commerce activities, concurrently with the federal government, except in fields preempted by Congress. See, e.g., *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, upholding Detroit's air pollution laws as constitutional when applied to ships, even though the ships are inspected and licensed by the federal government. The decision of the District Court undercuts this fundamental principle of constitutional law. The District Court's heavy reliance on *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, and *Knickerbocker Ice Company* v. *Stewart*, 253 U.S. 149, was particularly inappropriate since not

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only are those decisions not authority for the District Court's determination, but their meaningfulness as precedents is open to serious question.

B.

The second substantial question presented is whether Congress has preempted this field so that the states are powerless to enact anti-pollution legislation of their own. The federal Water Quality Improvement Act of 1970, 33 USC §§ 1161 *et seq.*, far from preempting the field, actually invites the states to enact legislation to protect their own vital environmental and economic interests from the threat of oil pollution. For example, 33 USC § 1161(e) expressly provides that the federal statute shall not be construed to preempt the right of a state to impose any other requirement or liability with respect to the discharge of oil into the territorial waters of the state. The federal Limitation of Liability Act of 1851, 46 USC § 183, which restricted the liability of shipowners to the extent of their investment, does not prevent states from enacting liability statutes of their own, and there is nothing in the Limitation of Liability Act which states otherwise. This Court has consistently held that conflicts between federal and state statutes should not be sought out simply because the federal and state statutes are not identical. And the state's right to legislate on all subjects relating to the health, safety, and welfare of its citizens should not be restricted except by clear Congressional intent to do so. See, in this regard, *A. E. Nettleton Co.* v. *Diamond,* 264 N.E. 2d 118, 27 N.Y. 2d 182 (1970), app. dism. *sub. nom. Reptile Products Ass'n.* v. *Diamond,* 401 U.S. 969; and *Palladio, Inc.* v. *Diamond,* 321 F. Supp. 630 (S.D.N.Y. 1970), aff'd 440 F. 2d 1319, cert. den. —— U.S. —— (Dec. 7, 1971), where the courts upheld the constitutionality of the New York endangered species statute (Agriculture and Markets Law § 358-a) even though the state law was more stringent than the federal prohibitions. See too *N. Y. State Waterways Assn.* v. *Diamond,* —— F. Supp. —— (W.D.N.Y., Burke, J., decided Jan. 12, 1972), sustaining New York's

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Navigation Law § 33-c, which prohibits the discharge of sewage from vessels in the state's waters, against similar claims of federal preemption and interference with admiralty jurisdiction.

The District Court repeatedly begged the question whether the Florida statute was within the "admiralty jurisdiction" of the federal government. The act is in fact not limited to seagoing vessels at all but applies to oil discharges from onshore facilities, docks, drilling rigs, and barges and other vessels not within the federal admiralty jurisdiction. Here the state has plenary responsibility, consistently expressed by its Legislature, to protect its waters, harbors, wetlands and beaches from oil spills over and above whatever remedies may exist under federal law.

CONCLUSION

The decision of the District Court imposes the most serious legal restraints upon the states' right to legislate in the field of water pollution on behalf of their citizens, and this Court should note probable jurisdiction.

Dated: New York, New York, April 6, 1972.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for State of New York, amicus curiae

Samuel A. Hirshowitz
First Assistant Attorney General

Philip Weinberg
James P. Corcoran
Assistant Attorneys General
of Counsel

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APPENDIX

§ 1221. Prohibition against pollution of waters of marine district

1. Sewage, industrial waste or other wastes, or any substance injurious to edible fish and shellfish, or the culture or propagation thereof, or which shall in any manner affect the flavor, color, odor or sanitary condition of such fish or shellfish so as to injuriously affect the sale thereof, or which shall cause any injury to the public and private shell fisheries of this state shall not be placed or allowed to run into the waters of the state in the marine district nor into any waters of Long Island, tributary to the marine district.

2. Garbage, cinders, ashes, oils, sludge or refuse of any kind shall not be thrown, dumped or permitted to run from any vessel or building, on land or water into the waters of the marine district.

L.1953, c.879; amended L.1961, c.490, § 5, eff. Jan. 1, 1962.